

2015

**State of Utah, Plaintiff/Appelle, vs. Colorado Steven Irwin,  
Defendant/Appellant : Brief of Appellant**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,

Plaintiff/Appellee,

vs.

COLORADO STEVEN IRWIN,

Defendant/Appellant.

Case No. 20150217-CA

Appellant is not incarcerated.

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**BRIEF OF APPELLANT**

Appeal from a restitution order following guilty pleas to Theft by Receiving Stolen Property, a third degree felony, in violation of Utah Code §76-6-408, and Burglary, a third degree felony, in violation of Utah Code §76-6-202, in the Third District Court, in and for Salt Lake County, State of Utah, the Honorable Charlene Barlow presiding.

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UTAH APPELLATE COURTS

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**JURISDICTIONAL STATEMENT**

This is an appeal from a restitution order entered on March 19, 2015. R.69-70, 75-77; Addendum A (Order of Restitution and Sentence, Judgment, Commitment). This Court has jurisdiction under Utah Code §78A-4-103(2)(e).

**ISSUE AND STANDARD OF REVIEW**

Issue I: Whether the trial court abused its discretion by awarding a restitution amount in excess of the replacement value of the watches which is in conflict with Utah's Crimes Victims Restitution Act?

Standard of Review: A trial court's restitution order will not be disturbed "unless it exceeds that prescribed by law or [the trial court] otherwise abused its discretion."

*State v. Ludlow*, 2015 UT App 146, ¶5, 788 Utah Adv. Rep. 25 (alterations in the original).

Preservation: This issue was preserved by counsel's motion and argument. R. 65; 85:9-13.

### **STATUTORY PROVISIONS**

The following statutes are relevant to the issues on appeal. Their text is provided in full in Addendum B: Utah Code §77-38a-102, §77-38a-301, §77-38a-302.

### **STATEMENT OF THE CASE AND FACTS**

On November 26, 2013, Colorado Steven Irwin ("Mr. Irwin") pleaded guilty to an amended count of Theft by Receiving Stolen Property, a third degree felony, and Burglary, a third degree felony. R.35-41, 45-50. Mr. Irwin admitted that on May 23, 2013, he entered Iron Horse Management, a business owned by Jeff Horsley, and that he took watches valued in excess of \$5,000 from the business. R.2-3, 36; 86:6-7. A total of 102 Rockwell watches were taken in the course of the burglary. R.2.

Mr. Irwin "agree[d] to pay restitution" as part of the plea agreement that was made with the State. R.38. On the day that the pleas and sentencing occurred for this matter, the State did not submit a specified requested restitution amount. R.86:1-12. The probable cause statement contained in the Information listed the value of the watches as \$39,004. R.2; R.85:4. The Honorable Charlene Barlow sentenced Mr. Irwin to a suspended prison term for both felony counts and placed him initially on court probation so that he could first take care of a pending federal case before being placed on AP&P supervision for this matter. R.45-50; R.86:11. As part of his probation, Mr. Irwin was ordered to pay "restitution in full[,]" but no amount was specified. R.49; 86:12.



On November 25, 2014, the State filed a motion seeking restitution in the amount of \$32,753.52 to be awarded to Iron Horse Management. R.63-64. Mr. Irwin filed a timely objection to the State's motion for order of restitution. R.65. A restitution hearing for this matter took place on March 5, 2015. R.69-70, 85.

At the hearing, the dispute over the restitution amount centered on whether the amount should be determined using the Manufactured Suggested Retail Price (MSRP) of the watches (\$39,004), or the replacement costs of the watches (\$13, 651.40). R.34, 61-62; 85:4-5, 11-12. The State initially asked for a restitution amount of \$32,753.52, which was derived from taking the MSRP value of the watches as determined by the manufacturer, Rockwell (\$39,0004), minus the monies that Iron Horse Management received from Farmers Insurance for the theft of the watches (\$6,250.48). R.57, 61-64; 85:4, 7-9. The State also acknowledged that Farmers Insurance provided a statement of loss that identified the total value of the stolen watches as being \$35,155.48. R.60; 85:4. The State then conceded that it would accept as complete restitution for Iron Horse Management a total of \$35,155.48 minus the \$6,250.48 the victim received from the insurance company. R.30-34; 85:5-6. Additionally, the State requested that Mr. Irwin make a restitution payment to Farmers Insurance for \$6,250.48. R.85:5.

The State, however, opposed basing the entire restitution amount for the watches on the replacement costs of the watches (\$13,651.40) as was determined by Rockwell in a victim impact statement which had been submitted for this matter. R.30-34; 85:5-7. To support the request for basing restitution on the MSRP value of the watches, the State argued that the victim was deprived of the opportunity to sell the watches "over the last

year.” R.85:9. The State, however, did not provide any proof of any actual lost opportunity costs for Iron Horse Management. R.85:13. The State also did not submit any proof that the victim could not get 102 Rockwell watches back if the replacement costs were ordered as the appropriate restitution amount. R.85:12.

Mr. Irwin’s counsel argued for a restitution amount of \$13, 651.40, the replacement costs of the watches, as this would return Iron Horse Management back to the same position that this business was in before the watches were stolen. R.85:11-13. That is, the replacement costs would enable Iron Horse Management to buy 102 Rockwell watches, which is the exact number of watches that were taken by Mr. Irwin in the course of the burglary. R.2; 85:11-12. Mr. Irwin’s counsel pointed out that restitution is “not a punitive measure” but “is designed to make the victim whole.” R.85:11. Mr. Irwin’s counsel also argued that the MSRP value would improperly create a windfall or financial benefit for the victim. R.85:9, 11. That is, if Iron Horse Management were given the MSRP value of \$39,004, which is the amount of money the manufacturer recommended the watches be sold for, this business could then buy 102 Rockwell watches again for only the replacement costs of \$13,651.40, and then turn around and sell those same 102 watches “at the MSRP price *again*.” R.85:11, 13. (emphasis added). Thus, Mr. Irwin’s counsel argued that the replacement value of \$13,651.40 was more appropriate because it would allow the victim to obtain the 102 Rockwell watches again, and then the business could “go on to sell [the watches] at whatever cost [it] can get.” R.85:11.

The trial court acknowledged that the MSRP amount was not the amount needed for Iron Horse Management to replace the stolen watches, but was instead the amount that the business “would have received” if they had sold the watches. R.85:9. Nevertheless, the trial court concluded that the lost opportunity costs would be reflected in the MSRP value. R.85:13. The trial court also agreed with the State that restitution should be based upon the amount that an item sells for, as opposed to the amount that a business must pay in order to obtain that item. R.85:13-14. The trial court ordered the total amount of restitution at \$35,155.48, the amount of loss as determined by Farmers Insurance. R.85:14. Mr. Irwin was ordered to pay Iron Horse Management \$28,905 and Farmers Insurance \$6,250.48. R.85:14. Mr. Irwin filed a timely notice of appeal from the order of restitution. R.78-81.

### **SUMMARY OF THE ARGUMENT**

The trial court erred when it ordered Mr. Irwin to pay restitution for an amount that far exceeded the replacement costs of the watches. Utah’s Crime Victims Restitution Act grants pecuniary damages to a victim, but it excludes the ordering of punitive damages against a defendant. Utah case law also clearly establishes that the purpose of restitution is to make the victim whole, which is to return the victim to the same economic position that it was in before the crime had been committed. Thus, restitution awards should not create a windfall or financial gain for the victim. When the district court ordered Mr. Irwin to pay an amount of restitution in excess of the replacement value of the Rockwell watches, the district court improperly created a windfall for Iron Horse Management and imposed a punitive damage on Mr. Irwin.

The trial court also erred in basing the restitution amounts on lost opportunity costs. In this matter, the State failed to put on any evidence that showed that Iron Horse Management suffered any lost opportunity costs as a result of Mr. Irwin's theft of the 102 Rockwell watches. Moreover, lost opportunity costs are too speculative and attenuated from the criminal conduct to justify restitution in this matter. Thus, the replacement value of the watches, and not the MSRP value, was the appropriate restitution amount for this matter.

## **ARGUMENT**

### **II. The Trial Court Abused Its Discretion in Awarding a Restitution Amount in Excess of the Replacement Value of the Watches as this Conflicted with Utah's Crimes Victims Restitution Act.**

Utah's Crime Victims Restitution Act allows crime victims to be restored to the economic position that they were in before the crime occurred. The Act provides that in "a criminal action, the court may require a convicted defendant to make restitution." Utah Code §77-38a-301. Restitution encompasses "full, partial, or nominal payment for pecuniary damages to a victim." Utah Code §77-38a-102(11). Thus, a victim is only entitled to receive pecuniary damages in a restitution award. *State v. Ludlow*, 2015 UT App 146, ¶6, 788 Utah Adv. Rep. 25. "'Pecuniary damages' means all *demonstrable* economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, *but excludes punitive or*

*exemplary damages and pain and suffering.*” Utah Code §77-38a-102(6) (emphasis added).

Pecuniary damages must be demonstrable economic injuries. *State v. Brown*, 2009 UT App 285, ¶10, 221 P.3d 273. “Pecuniary damages relating to property are calculated based on the fair market value of property taken, destroyed, broken, or otherwise harmed.” *Ludlow*, 2015 UT App 146, ¶6 (quotations omitted). “Fair Market Value” is an amount determined “by what the owner [of the property] could expect to receive, and the amount a willing buyer would pay to the true owner for the stolen item.” *Id.* at ¶6 (alterations in original) (quotations omitted). However, using fair market value as the standard in measuring the victim’s loss is often “a sticky wicket, unpredictable in practice because it is entirely relative, depending on who is doing the buying and who is doing the selling.” *State v. Hall*, 304 P.3d 677, 681 (Kan. 2013).

Utah case law points out that the true measure of damage is flexible, allowing trial courts to fashion an equitable award to the victim that addresses the actual losses suffered by the victim. *See Jenkins v. Equipment Center, Inc.*, 869 P.2d 1000, 1004 (Utah Ct. App. 1994), *cert. denied*, *Jenkins v. Hesston*, 879 P.2d 266 (Utah 1994) (“[t]he primary objective in rendering an award of damages for conversion is to award the injured party full compensation for *actual losses*[,]” and “rules relating to the measure of damages are flexible, and can be modified in the interest of fairness” (emphasis added) (quotations omitted)); *see State v. Hight*, 2008 UT App 118, ¶3, 182 P.3d 922. In some cases, the purchase price of the items may be most appropriate in determining the actual losses of a victim. *See State v. Corbitt*, 2003 UT App 417, ¶15, 82 P.3d 211. In other cases, the

purchase price is not the appropriate measure of actual loss to a victim. *See State v. Ludlow*, 2015 UT App 146, ¶10. Ultimately “[t]he appropriate measure of the loss or damage to a victim is fact-sensitive and will vary based on the facts of a particular case.” *Corbitt*, 2003 UT App 417, ¶15.

Utah law also makes clear that the appropriate amount of restitution is the amount that is required to make the victim whole, a process of returning the victim to the position he or she was in before the crime was committed. *See State v. Wadsworth*, 2015 UT App 138, ¶13, 351 P.3d 826 (restitution seeks to “‘accomplish the purpose of making crime victims whole for the harms they suffer because of a defendant's criminal conduct’”).

Restitution is “‘to compensate victims for the harm caused by a defendant and ... to spare victims the time, expense, and emotional difficulties of separate civil litigation to recover their damages from the defendant.’” *Corbitt*, 2003 UT App 417, ¶14 (emphasis added).

“[T]he fundamental purpose of compensatory damages is to place the plaintiff [or the victim] in the same position he would have occupied had the tort not been committed.”

*Mahana v. Onyx Acceptance Corp.*, 2004 UT 59, ¶26, 96 P.3d 893 (citing Restatement (Second) of Torts, § 903 cmt. a (1979)). Stated another way, “[i]n determining the measure of recovery, aside from harm to body, emotions or reputation, a balance sheet is in effect set up by the court in which are stated the items of assets and liabilities that have been affected by the tort, (a) before the tort, and (b) as they appear at the time of trial.”

Restatement (Second) of Torts § 906 cmt a. “[T]he tortfeasor is liable only for the amount of the net harm that he has caused.” *Id.* (emphasis added). Essentially, restitution

awards make a victim whole by returning the victim to the same economic position that they were in before the crime occurred. *Id.*

Outside jurisdictions also agree with Utah that the purpose of restitution is to make the victim whole by returning the victim to the position they were in before the crime occurred. See *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (“[r]estitution has traditionally been viewed as an equitable device for restoring victims to the position they had occupied prior to a wrongdoer's actions”); see also *People v. Busser*, 113 Cal.Rptr.3d 536, 541 (Cal. Ct. App. 2010) (“[v]ictims are only entitled to an amount of restitution so as to *make them whole*, but nothing more, from their *actual losses* arising out of the defendants' criminal behavior” (emphasis added)).

Consistent with Utah case law, the Kansas Supreme Court has also emphasized that the appropriate restitution amount is one that “will compensate the victim for the *actual loss* caused by the defendant's crime.” *Hall*, 304 P.3d at 679 (emphasis added). When determining an appropriate restitution amount, the *Hall* court refused to employ a bright-line rule that favored either the retail price or the wholesale cost of inventory that was stolen from a veterinary clinic. *Id.* *Hall* further emphasized that in determining the actual losses sustained by a victim, a number of factors must be considered, including:

the retail price, which includes a reasonable profit; *the wholesale cost charged to the victim*; the setting from which the property was taken; the nature and intended use of the property; *whether a market existed for the product and how robust the market was*; costs associated with an interruption to this market, which might include costs to maintain stock, electricity, labor, taxes, and shipping; the speed and ease of obtaining replacement items for sale; and any actual lost sales and any associated loss of goodwill.

*Id.* at 682 (emphasis added). Such a list “is exemplary only and not exclusive.” *Id.*

In this matter, the trial court erred in granting a restitution amount that exceeded the replacement value of the watches (\$13,651.40), as this is the value that was needed to make the victim whole. R.30-34; 85:11-13. *See also Wadsworth*, 2015 UT App 138, ¶13. The replacement value of the watches is also the value that represents the actual loss that was sustained by Iron Horse Management. *See Jenkins* 869 P.2d at 1004; *see also Hall*, 304 P.3d at 679. Prior to the burglary and theft, Iron Horse Management had 102 Rockwell watches. R.2. Making the victim whole for actual losses in this matter, therefore, required granting a restitution award that would allow Iron Horse Management to once again own 102 Rockwell watches. *See Wadsworth*, 2015 UT App 138, ¶13.

In this matter, a victim impact statement was submitted that showed that the replacement value of the 102 Rockwell watches was \$13,651.40. R.30-34; 85:5-7. Thus, a restitution order for the replacement value of \$13,651.40 would have allowed the victim to once again own 102 Rockwell watches and restore the victim to the economic position that the business was in prior to the commission of the crimes in this matter. *See* Restatement (Second) of Torts § 906 cmt a. Moreover, the State did not submit any proof that the victim could not get 102 Rockwell watches back if the replacement costs were ordered as the appropriate restitution amount. R. 85:12. Ultimately, the trial court erred in awarding a restitution amount in excess of the replacement value as this was the proper amount to make the victim whole.

The Manufacture Suggestive Retail Price (“MSRP”) in this matter of \$39,004 was not the value required to make the victim whole in this matter. The problem with retail prices are that they “can be arbitrarily inflated or deflated by the merchant, and therefore,



not realistically represent a true value to the victim.” *State v. Carter*, 544 S.W.2d 334, 338 (Mo. Ct. App. 1976). Furthermore, a MSRP value is “[t]he amount of money for which the company that produces a product recommends that it be sold in stores. *MSRP does not necessarily correspond to the price retailers actually use or to the price customers are willing to pay.* Retailers may need to set their prices below MSRP to move inventory, especially for items with low demand or in a sluggish economy.”<sup>1</sup> (emphasis added). The MSRP value is an aspirational value of what an item could sell for in a thriving economy and if consumer demand for the item was high.<sup>2</sup> Volatile market forces and a lack of consumer demand may, however, prevent an item from selling for its MSRP value.

Thus, the fluctuating nature of a MSRP value does not always provide a good standard to use when determining the amount necessary to make the victim whole for a restitution determination as it does not necessarily correspond to the actual losses suffered by a victim. *See Carter*, 544 S.W.2d, at 338. Instead, it may be the wholesale value of an item, and not its retail value, that properly constitutes the actual losses suffered by a victim. *See Illinois Cent. R. Co. v. Crail*, 281 U.S. 57, 64-66 (1930); *Hall*, 304 P.3d at 679. *Cf. State v. Islam*, 344 P.3d 22 (Or. Ct. App 2015) (the retail value, and not wholesale value, of the stolen jeans was the correct measure of restitution), *review granted*, 357 Ore. 550 (Or. 2015).

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<sup>1</sup> INVESTIPEDIA, Manufacture’s Suggestive Retail Price-MSRP, <http://www.investopedia.com/terms/m/manufacturers-suggested-retail-price-msrp.asp> (last visited August 13, 2015).

<sup>2</sup> *See Id.*

In this matter, the replacement value, and not the MSRP value constituted the actual losses suffered by the victim. The MSRP value of \$39,004 was merely the arbitrarily inflated value that the watches may have sold for in a thriving economy, and not indicative of the actual losses of the victim. *See Carter*, 544 S.W.2d, at 338. The MSRP value was not the amount needed to return Iron Horse Management to the economic position it was in before the crimes occurred, which was owning 102 Rockwell watches. Rather, the replacement value of \$13,651.40 was the amount required to return Iron Horse Management to the economic position it was in prior to the commission of the crime. Mr. Irwin therefore asks this Court to reverse the trial court's order of restitution on grounds that the replacement value of \$13,651.40 is more properly the amount needed to make the victim whole and to return the victim to the economic position the business was in before the crime was committed. *See Wadsworth*, 2015 UT App 138, ¶13.

A. The Restitution Value Constituted A Windfall for the Victim

Restitution should not provide a windfall for the victim. *See Ludlow*, 2015 UT App 146, ¶13 (the trial court improperly granted a restitution amount that granted the victim a windfall). Utah case law is consistent with outside jurisdiction case law that emphasizes that restitution should not create a windfall for the victim. *See Simmons v. State*, 205 S.W.3d 194, 198 (Ark. Ct. App. 2005) (restitution “is to make the victim *whole in relation to the crime committed*, not to put the victim in a better position before the crime occurred” (emphasis in original)), *appeal granted* 159 S.W.3d 312 (Ark. 2004); *see also People v. Chappelone*, 107 Cal.Rprt.3d 895, 905 (Cal. Ct. App. 2010) (“[a]

restitution order is intended to compensate the victim for its actual loss and *is not intended to provide the victim with a windfall*” (emphasis added)).

In this matter, the trial court improperly awarded the victim a windfall or financial benefit by ordering an amount that far exceeded the replacement value of the watches. The trial court ordered Mr. Irwin to pay a total amount of restitution at \$35,155.48, the amount of loss as determined by Farmers Insurance. R.85:14. Mr. Irwin was also ordered to pay Iron Horse Management \$28,905 and Farmers Insurance \$6,250.48. The trial court agreed with the State that restitution should be based upon the amount that an item sells for, as opposed to the amount that a business must pay in order to obtain that item. R.85:13-14.

The problem with the restitution amount ordered by the trial court is that it created a windfall for the victim by allowing the victim to repurchase 102 Rockwell watches at the replacement cost of \$13,651.40, pocket the remaining monies, and then make even more additional monies by selling the Rockwell watches “at the MSRP price *again*.” R.85:11, 13. (emphasis added). The restitution amount ordered in this matter, therefore, resulted in putting Iron Horse Management in a far superior or better financial position than it was in before the crime occurred, as opposed to putting it in a similar financial position. *Id.* This advantageous result for Iron Horse Management clearly conflicts with established Utah case law and outside jurisdictions that prohibit a victim from receiving a windfall from restitution awards, and instead requires that a victim be returned to the economic position that they were in prior to the occurrence of the crime. *See Ludlow*, 2015 UT App 146, ¶13; *see Chappelone*, 107 Cal.Rprt.3d, at 905.

Because the restitution award in this matter constituted a windfall for Iron Horse management, Mr. Irwin requests that this Court reverse the trial court's holding and instead find that the replacement value of the watches of \$13,651.40 is the appropriate restitution amount for this matter.

B. The Restitution Value Constituted Punitive Damages Against Irwin

Utah case law makes clear that allowing for restitution in criminal cases has a two-fold purpose: 1) it provides pecuniary damages for the victim, and 2) it functions as a rehabilitative penalty to “deter the defendant, and others, from future illegal behavior.” *State v. Laycock*, 2009 UT 53, ¶18, 214 P.3d 104. And, although there is a disciplinary and rehabilitative aspect to restitution, a trial court is not granted free license to impose “punitive or exemplary damages and pain and suffering” when determining an appropriate restitution amount. Utah Code §77-38a-102(6). Thus, because the primary purpose of restitution is not to punish a defendant, trial courts cannot set amounts in excess of the actual losses to the victim in an effort to punish a defendant. *Id*; *see also Jenkins* 869 P.2d at 1004; *see also Wadsworth*, 2015 UT App 138, ¶13. *Cf. Lawrence v. Intermountain, Inc.*, 2010 UT App 313, ¶23, 243 P.3d 508 (“the very purpose of punitive damages is to deter further wrongdoing”). After all, in the context of criminal cases, a trial court has incarceration, fines, and other methods available to it for punishment purposes. *See State v. Houston*, 2015 UT 40, ¶64, 353 P.3d 55, (“[f]ines, imprisonment, and even execution may be imposed [by a trial court] depending upon the enormity of the crime”), *as amended* (Mar. 13, 2015), *reh'g denied* (June 30, 2015). *See also Newman*,

144 F.3d at 540 (“[p]ayment of restitution is not an affirmative disability or restraint that operates in a manner analogous to imprisonment.”).

The idea that Utah’s Crime Victims Restitution Act’s main purpose is not punitive is exemplified by the changes that the Utah Legislature has made to its victim restitution statutes. Before 1995, the old victim restitution statute used to allow a trial court to require that the “the defendant make restitution *up to double the amount of pecuniary damages* to the victim or victims of the offense of which the defendant has pleaded guilty, is convicted, or to the victim of any other criminal conduct admitted by the defendant to the sentencing court ...” Utah Code Ann. §76-3-201(3)(a)(i)(1990) (emphasis added). *See also State v. Twitchell*, 832 P.2d 866, 869 (Utah 1992) (“the restitution statute’s wording [prior to 1995] clearly contemplates penal as well as compensatory purposes for restitution”). However, this part of the statute allowing for a trial court to double the amount of pecuniary damages to be imposed for a restitution award was deleted by the Utah Legislature in 1995. *See* 1995 Utah Laws Ch. 301 (H.B. 333). With this deletion, the Utah Legislature intended to remove the more punitive purpose of restitution determinations. *See State v. Harker*, 2010 UT 56, ¶12, 240 P.3d 780 (“[t]o discern legislative intent, we look first to the statute’s plain language [and]... read the plain language of [the] statute as a whole and interpret its provisions in harmony with other statutes in the same chapter and related chapters” (quotations omitted)).

In this matter, the restitution amount constituted punitive damages against Mr. Irwin because this value exceeded the amounts necessary to replace the 102 Rockwell watches and make the business victim whole. *See Wadsworth*, 2015 UT App 138, ¶13.

Because Utah's Crime Victims Restitution Act prohibited the trial court from imposing punitive damages on Mr. Irwin, the trial court should not have awarded a restitution amount that exceeded the replacement value of the watches, as doing so improperly punished Mr. Irwin through the excessive restitution amount. *See* Utah Code §77-38a-102(6). Furthermore, in this matter, Mr. Irwin pled guilty to two third degree felony matters, thus the trial court had the opportunity to impose punishments on Mr. Irwin through different means other than by awarding a restitution amount that exceeded the actual losses sustained by Iron Horse Management. R.35-41, 45-50. *See also Houston*, 2015 UT 40, ¶64. Because the MSRP value constituted punitive damages in this matter, which conflicts with Utah's restitution statute, Mr. Irwin asks this Court to reverse the trial court's restitution ruling and find that the replacement value of the watches of \$13,651.40 is the appropriate restitution amount for this matter.

C. The Restitution Value Was Improperly Based on Lost Opportunity Costs.

Utah's Crime Victims Restitution Act compensates victims for actual demonstrable losses, not unsubstantiated hypothetical losses. *See Brown*, 2009 UT App 285, ¶10. The specific types of actual pecuniary losses that the Act allows for are:

- (i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;
- (ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;
- (iii) the cost of necessary physical and occupational therapy and rehabilitation;
- (iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;
- (v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the

victim and were essential to the victim's current employment at the time of the offense; and  
(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

Utah Code §77-38a-302(5)(b).

This Court recently held that the plain language of Utah Code §77-38a-302(5)(b) is not meant to limit the relevant facts that a court should consider when awarding restitution amounts. *See Wadsworth*, 2015 UT App 138, ¶21 (when determining restitution, “a court must consider all facts that are relevant to the case, including ones beyond those listed in [Utah Code §77-38a-302(5)(b)]”). However, the restitution statute does limit a victim's damages to those that “aris[e] out of the facts or events constituting the defendant's criminal activities.” *Id.* at ¶18 (alteration in original). And, in the context of a wrongful death action, the Utah Supreme Court has previously held that lost opportunity costs do not necessarily constitute a valid measure of damages when they fail to measure the actual loss that is sustained by the victim. *Jones v. Carvell*, 641 P.2d 105, 111, (Utah 1982).

When determining proper restitution amounts, “Utah has adopted a modified but for test to determine whether pecuniary damages *actually arise out of* criminal activities.” *State v. Birkeland*, 2011 UT App 227, ¶11, 258 P.3d 662 (emphasis added) (internal quotation marks omitted). This test requires a showing “that (1) the damages would not have occurred but for the conduct underlying the . . . [defendant’s] conviction and (2) the causal nexus between the [criminal] conduct and the loss . . . is not too attenuated (either factually or temporally).” *Id.* at ¶11. (quotations omitted). *See also State v. Ruiz*, 2013 UT

App 166, ¶16, 305 P.3d 223; *State v. Mast*, 2001 UT App 402, ¶¶18-19, 40 P.3d 1143; *State v. Harvell*, 2009 UT App 271, ¶¶13-15, 220 P.3d 174 (because the brake system repairs and iPod replacement were too attenuated from defendant's reckless driving, restitution should not have been ordered for these items).

Recently, the Utah Supreme Court addressed a case where the victim of unlawful sexual activity with a sixteen or seventeen year old requested restitution because she “had moved from Page, Arizona, to Flagstaff, Arizona, because the defendant was a prominent member of the community in Page it had become difficult for [the victim and her mother] to continue residing there. The trial and hearings were held in Kanab, Utah.” *State v. Brown*, 2014 UT 48, ¶¶4, 8n.1, 342 P.3d 239. The victim requested restitution for lost wages incurred attending the hearings and the cost of traveling to the hearings. *Id.* ¶6. The Utah Supreme Court held that the “restitution at issue in this case is not properly compensable under” the statutory definition of pecuniary damages. *Id.* ¶¶22-23. “[T]here is no question that such damages would not be compensable pecuniary damages in an action for sexual assault and battery under Utah law” and the “Restatement generally forecloses recovery of costs and expenses incurred in the maintenance of, or related to, litigation.” *Id.* ¶23. “On that basis,” the court “conclude[d] that the lost wages and expenses requested for [the victim] are not ‘pecuniary damages’ compensable as an element of restitution.” *Id.* ¶24. Because the case could be resolved on that basis alone, the court did not address the modified “but for” test. *Id.* Mr. Irwin’s case should be handled similarly.



In this matter, the State failed to prove that Iron Horse Management suffered any actual lost opportunity costs as a result of the criminal conduct in this matter. R.85:13. The State argued that the victim was deprived of the opportunity to sell the watches “over the last year.” R.85:9. However, there was no evidence that Iron Horse Management was in the business of selling watches, or that it would have attempted to sell the watches had the watches not been stolen. *See* R.85:13. There was no evidence presented that Iron Horse Management had no comparable merchandise to sell its customers. *See Chappelone*, 107 Cal.Rprt.3d, at 910. There was no evidence presented that Iron Horse Management lost any profits due to the burglary or that its customers were deprived of any sales. R.85:13; *see also Chappelone*, 107 Cal.Rprt.3d, at 910. Ultimately, the lost opportunity costs addressed by the State were not “demonstrable,” only speculative, and therefore too attenuated from the crime. *See* Utah Code §77-38a-102(6) (Pecuniary damages are ones that are “demonstrable.”<sup>3</sup>); *see also Brown*, 2009 UT App 285, ¶10; *State v. Birkeland*, 2011 UT App 227, ¶11; *Osteen v. State*, 616 So. 2d 1215, 1218 (Fla. Dist. Ct. App. 1993) (restitution was not awarded for lost business expenses because the measure of damages was “speculative and difficult to prove.”).

In awarding the restitution amount in this matter, the trial court concluded that the lost opportunity costs would be reflected in the MSRP value. R.85:13. This is incorrect, however, as: 1) the State failed to prove that Iron Horse Management suffered any actual

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<sup>3</sup> Demonstrable means “[o]bvious or apparent.” The Free Dictionary, DEMONSTRABLE, <http://www.thefreedictionary.com/demonstrable> (last visited Sept. 9, 2015).

lost opportunity costs<sup>4</sup>, R.85:13, and 2) the MSRP value constitutes the optimal amount the watches could have sold for in a thriving economy with high consumer demand, not the actual losses sustained by Iron Horse Management. *See Carter*, 544 S.W.2d, at 338. Furthermore, the State failed to show that the economic and market conditions were strong enough to have allowed Iron Horse Management to receive the full MSRP value of the watches even if they had tried to sell the watches “over the last year.” R:85:9; *see also Hall*, 304 P.3d, 682. The trial court also never examined the realities of the economic market before applying the MSRP value of the watches to the restitution amount. R.85:13-14. Thus, the trial court erred in applying the MSRP value to determine the lost opportunity costs for Iron Horse Management when the record failed to show that this business suffered any actual and determinable lost opportunities whatsoever. *Id.* Instead, the trial court should have ordered the replacement value of the watches as this amount would have allowed Iron Horse Management to obtain 102 Rockwell watches again, and have allowed the business to decide whether it wished to keep the watches, or sell them for whatever price could be obtained in a fluctuating market. R.85:11.

D. This Issue Was Preserved.

Mr. Irwin’s counsel preserved the issue that the trial court erred in awarding a restitution amount in excess of the replacement value of the watches. R. 65; 85:9-13.

Mr. Irwin’s counsel argued that restitution is “not a punitive measure” but “is designed to

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<sup>4</sup> There does not appear to be any accepted calculation for determining lost opportunity costs. “Since opportunity costs frequently relate to future events, they are often difficult to quantify.” Encyclopedia.com, OPPORTUNITY COSTS, [http://www.encyclopedia.com/topic/Opportunity\\_Cost.aspx](http://www.encyclopedia.com/topic/Opportunity_Cost.aspx) (last visited Sept. 10, 2015); *see also Carvell*, 641 P.2d at 111.

make the victim whole.” R. 85:11. Mr. Irwin’s counsel also argued against applying the MSRP value in this matter as it would improperly “create a windfall” or financial benefit for the victim. R. 85:9, 11. Mr. Irwin’s counsel requested a restitution amount of \$13,651.40, the “replacement costs of the watches,” as this would return Iron Horse Management “back [to] the same position” that this business was in before the watches were stolen. R. 85:11-13. Lastly, Mr. Irwin’s counsel argued against a restitution amount that included “lost opportunity cost[s]” because the State failed to provide any proof that Iron Horse Management had sustained “some lost opportunity” as a result of the crimes committed in this matter. R.85:13.

Nevertheless, in an abundance of caution, if this Court finds that this issue was not preserved, this Court may review it for plain error. Plain error requires reversal where “(i) [a]n error exists; (ii) the error should have been obvious to the trial court, and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome...” *State v. Dunn*, 850 P.2d 1201, 1208-09 (Utah 1993). First, as explained previously, an error exists because the trial court failed to award a restitution amount that would make the victim whole and compensate the victim for actual damages. *See Jenkins*, 869 P.2d at 1004; *see also Wadsworth*, 2015 UT App 138, ¶13. Instead, the trial court improperly awarded a restitution amount that created a windfall for Iron Horse Management and imposed a punitive damage on Mr. Irwin. *State v. Ludlow*, 2015 UT App 146, ¶13.

Second, the error was obvious. The “obviousness requirement poses no rigid and insurmountable barrier to review.” *State v. Eldredge*, 773 P.2d 29, 35 n.8 (Utah 1989),

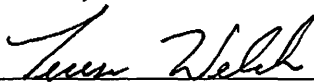
*cert denied, Eldredge v. Utah*, 493 U.S. 814 (1989). Here, the error should have been obvious to the trial court as the plain language of Utah's Crime Victim's Restitution Act and relevant Utah case law requires that the appropriate amount of restitution is the amount required to compensate for actual damages sustained by the victim. Utah Code §77-38a-102(6); *see also Jenkins*, 869 P.2d at 1004. This further means that the victim should be returned to the position it was in prior to the commission of the crime. *Onyx Acceptance Corp.*, 2004 UT 59, ¶26.

Third, the error was prejudicial. An error is prejudicial when "there is a reasonable likelihood of a more favorable outcome[.]" "absent the error." *State v. Cox*, 2012 UT App 234, ¶2, 286 P.3d 15. Mr. Irwin has been prejudiced by the trial court finding as his financial obligation in this matter far exceeds the amount that is appropriate to cover the actual losses that were sustained by Iron Horse Management. If the trial court had ordered the amount of restitution that was necessary to make the victim whole in this matter, Mr. Irwin's total restitution obligation would have been \$13,651.40, and not \$35,155.48. R.85:14.

### CONCLUSION

For the reasons above, Mr. Irwin respectfully requests that this Court reverse the entry of the trial court's restitution order and find that the replacement value of the watches of \$13,651.40 is the appropriate restitution amount for this matter.

SUBMITTED this 18<sup>th</sup> day of September, 2015.

  
\_\_\_\_\_  
TERESA L. WELCH  
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, TERESA L. WELCH, hereby certify that I have caused to be hand-delivered an original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State Street, 5th Floor, Salt Lake City, Utah 84114; and three copies to the Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6th Floor, Salt Lake City, Utah 84114, this 18<sup>th</sup> day of September, 2015.


  
\_\_\_\_\_  
TERESA L. WELCH

CERTIFICATE OF COMPLIANCE

In compliance with the type-volume limitation of Utah R. App. P. 24(f)(1), I certify that this brief contains 6,117 words, excluding the table of contents, table of authorities, addenda, and certificates of compliance and delivery. In compliance with the typeface requirements of Utah R. App. P. 27(b), I certify that this brief has been prepared in a proportionally spaced font using Microsoft Word 2010 in Times New Roman 13 point.

  
\_\_\_\_\_  
TERESA L. WELCH

DELIVERED this 18<sup>th</sup> day of September, 2015.

  
\_\_\_\_\_

## **ADDENDUM A**

Tab A

The Order of Court is stated below:

Dated: March 09, 2015  
09:52:15 AM

/s/ Charlene Barlow  
District Court Judge



SIM GILL, #6389  
District Attorney for Salt Lake County  
WILLIAM J. CARLSON #11528  
Deputy District Attorney  
8080 S. Redwood Rd., Suite 1100  
West Jordan, Utah 84088  
(385)468-7546

**IN THE THIRD DISTRICT COURT, WEST JORDAN DEPARTMENT,  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH**

STATE OF UTAH,

Plaintiff,

vs.

COLORADO IRWIN,

Defendant

**RESTITUTION ORDER**

Case No. 131401107

Judge Charlene Barlow

THE COURT, having allowed defendant a full hearing on restitution in compliance with Utah Code Ann §77-38a-202(4), hereby orders the Defendant to pay \$35,155.48 as follows: \$6,250.48 shall be paid to Farmers Insurance and \$28,905.00 shall be paid to Iron Horse Mangaement c/o Jeff Horsley. Adult Probation and Parole shall establish the payment plan for Defendant as a term of his probation.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2015.



Judge Charlene Barlow  
DISTRICT COURT JUDGE

0000076

March 09, 2015 09:52 AM

2 of 2

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

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STATE OF UTAH,	:	MINUTES
Plaintiff,	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 131401107 FS
COLORADO STEVEN IRWIN,	:	Judge: CHARLENE BARLOW
Defendant.	:	Date: March 10, 2015

---

Clerk: krisff  
DEFENDANT INFORMATION  
Date of birth: January 23, 1989  
Sheriff Office#: 357492

CHARGES

1. THEFT BY RECEIVING STOLEN PROPERTY (amended) - 3rd Degree Felony  
- Disposition: 11/26/2013 Guilty
2. BURGLARY - 3rd Degree Felony  
- Disposition: 11/26/2013 Guilty

Restitution Amount: \$6250.48 Plus Interest  
Pay in behalf of: FARMERS INSURANCE

Restitution Amount: \$28905.00  
Pay in behalf of: C/O JEFF HORSLEY IRON HORSE MANAGEMENT

Minutes created to reflect order of restitution that was signed by the Court on 3/9/15

Date: \_\_\_\_\_

\_\_\_\_\_  
CHARLENE BARLOW  
District Court Judge

3RD DIST. COURT - WEST JORDAN  
SALT LAKE COUNTY, STATE OF UTAH

---

STATE OF UTAH,	:	MINUTES
Plaintiff,	:	CHANGE OF PLEA
	:	SENTENCE, JUDGMENT, COMMITMENT
	:	
vs.	:	Case No: 131401107 FS
COLORADO STEVEN IRWIN,	:	Judge: CHARLENE BARLOW
Defendant.	:	Date: November 26, 2013

---

PRESENT

Clerk: pamfw

Prosecutor: GRAVES, JOSHUA N

Defendant

Defendant's Attorney(s): SEAMAN, CHRISTINE M

DEFENDANT INFORMATION

Date of birth: January 23, 1989

Sheriff Office#: 357492

Audio

Tape Number: 36 Tape Count: 10:05

CHARGES

1. THEFT BY RECEIVING STOLEN PROPERTY (amended) - 3rd Degree Felony

- Disposition: 11/26/2013 Guilty

2. BURGLARY - 3rd Degree Felony

- Disposition: 11/26/2013 Guilty

Defendant waives the reading of the Information.

Court advises defendant of rights and penalties.

Defendant waives time for sentence.

HEARING

On the record, on State's motion, Count 1 is amended to F3 as per West Valley City vs McDonald, defendant pleads Guilty to amended Count 1, defendant pleads Guilty to Count 2 as charged. Defendant is sentenced today.

SENTENCE PRISON

Based on the defendant's conviction of THEFT BY RECEIVING STOLEN PROPERTY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

0000045

Based on the defendant's conviction of BURGLARY a 3rd Degree Felony, the defendant is sentenced to an indeterminate term of not to exceed five years in the Utah State Prison.

The prison term is suspended.

SENTENCE JAIL SERVICE NOTE

Release to Federal custody.

SENTENCE JAIL CONCURRENT/CONSECUTIVE NOTE

The charges in this case are concurrent.

SENTENCE FINE

Charge # 1            Fine: \$5000.00  
                      Suspended: \$5000.00  
                      Due: \$0.00

Charge # 2            Fine: \$5000.00  
                      Suspended: \$5000.00  
                      Due: \$0.00

                      Total Fine: \$10000.00  
                      Total Suspended: \$10000.00  
                      Total Surcharge: \$0  
                      Total Principal Due: \$0  
                                 Plus Interest

ORDER OF PROBATION

The defendant is placed on probation for 18 month(s).  
Probation is to be supervised by Good behavior court probation.  
PROBATION CONDITIONS

No other violations.  
Notify the court of any address change.  
Defendant on Court probation until he is released from his Federal custody, then probation with AP&P will be set up.  
Pay restitution in full.  
Defendant waives timely filing of restitution by the State. The motion for restitution will be filed within a year. Defendant waives his right to a timely hearing on the restitution.  
Within 10 days of release from Federal custody, defendant ordered to contact his attorney to set a Review of Sentence hearing to set of probation conditions.

0000046

Case No: 131401107 Date: Nov 26, 2013

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Review hearing set.

REVIEW HEARING is scheduled.

Date: 07/08/2014

Time: 08:30 a.m.

Location: WJ Courtroom 36

8080 S REDWOOD ROAD

SUITE 1701

WEST JORDAN, UT 84088

Before Judge: CHARLENE BARLOW

Date: \_\_\_\_\_

CHARLENE BARLOW

District Court Judge

Individuals needing special accommodations (including auxiliary communicative aids and services) should call 3rd Dist. Court - West Jordan at (801)233-9700 three days prior to the hearing. For TTY service call Utah Relay at 800-346-4128. The general information phone number is (801) 233-9700.

0000047

## **ADDENDUM B**

Tab B

## **77-38a-102. Definitions.**

### **77-38a-102.**

As used in this chapter:

- (1) "Conviction" includes a:
  - (a) judgment of guilt;
  - (b) a plea of guilty; or
  - (c) a plea of no contest.
- (2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.
- (3) "Department" means the Department of Corrections.
- (4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.
- (5) "Party" means the prosecutor, defendant, or department involved in a prosecution.
- (6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and medical expenses, but excludes punitive or exemplary damages and pain and suffering.
- (7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.
- (8) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.
- (9) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at



that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(10) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12)

(a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14)

(a) "Victim" means any person or entity, including the Utah Office for Victims of Crime, who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

**77-38a-301. Restitution**

77-38a-301

Convicted defendant may be required to pay.

In a criminal action, the court may require a convicted defendant to make restitution.

Enacted by Chapter 137, 2001 General Session

## **77-38a-302. Restitution criteria.**

### **77-38a-302.**

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5)

(a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider:

(i) the factors listed in Subsections (5)(a) and (b);

(ii) the financial resources of the defendant, as disclosed in the financial declaration described in Section 77-38a-204;

(iii) the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(iv) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(v) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(vi) other circumstances that the court determines may make restitution inappropriate.

(d)

(i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

Amended by Chapter 74, 2013 General Session